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In The

# Supreme Court of the United States

October Term, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

*Petitioner,*

v.

MICHAEL BUCKLEY,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF PETITIONER

RALPH G. WELLINGTON*
NANCY WINKELMAN
*Attorneys for Amicus Curiae Consolidated Rail Corporation*

**Counsel of Record*

SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2000

BRUCE B. WILSON
LUCY S.L. AMERMAN
THOMAS J. WAMSER
ELLEN M. GOERING
Consolidated Rail Corporation
2001 Market Street
Philadelphia, PA 19103
*Of Counsel.*

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, Consolidated Rail Corporation respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner has consented to the filing of this brief; however, the respondent has refused to provide consent.

Consolidated Rail Corporation ("Conrail") is a privately-held corporation that is owned by Conrail, Inc., its publicly-held parent corporation.

Prior to this Court's decision in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), Conrail, like other United States railroads, had been subject to a proliferation of claims for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"), and had become increasingly concerned with the disparate treatment that these claims received in the courts. The potential for almost unlimited liability increased dramatically with the decisions of the Court of Appeals for the Third Circuit in *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993), and *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1993).

The Third Circuit's decisions in *Gottshall* and *Carlisle*, like the decision of the Court of Appeals for the Second Circuit in *Buckley v. Metro-North Commuter Ry. Co.*, 79 F.3d 1337 (2d Cir. 1996), expanded liability for emotional distress damages under the FELA to an unprecedented degree and made virtually any emotional distress claim cognizable. The Third Circuit's decisions also illustrated

the deep and irreconcilable conflicts among the circuits with respect to recovery for negligent infliction of emotional distress under the FELA.

This Court granted Conrail's petition for a writ of certiorari in *Gottshall* and *Carlisle* and reversed. Consistent with the FELA's purpose to protect railroad workers from the physical dangers of railroading and consistent with the admonitions of this Court that the FELA should follow the common law, in *Gottshall* the Court established a clear, bright line test for the recovery of damages for negligent infliction of emotional distress under the FELA – the common law zone of danger test. The Second Circuit's decision in *Buckley* represents a profound misapplication of the *Gottshall* zone of danger test, one that will have enormous consequences for the railroad industry.

In view of its great familiarity with the issue, its belief that the *Buckley* decision is in utter and irreconcilable conflict with *Gottshall*, its abiding concern that the zone of danger test be correctly applied in the lower courts, and its personal experience with the enormous costs of litigating non-meritorious emotional distress claims, Conrail respectfully requests that it be allowed to



participate in this case and to file the attached brief *amicus curiae* in support of petitioner.

Ralph G. Wellington*
Nancy Winkelman
*Attorneys for Amicus Curiae Consolidated Rail Corporation*

**Counsel of Record*

Schnader Harrison Segal & Lewis
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2000

Bruce B. Wilson
Lucy S.L. Amerman
Thomas J. Wamser
Ellen M. Goering
Consolidated Rail Corporation
2001 Market Street
Philadelphia, PA 19103
*Of Counsel.*

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* Consolidated Rail Corporation is set forth in the motion accompanying this brief.

## SUMMARY OF ARGUMENT

As established by this Court in *Gottshall*, the zone of danger test compensates railroad workers whose emotional distress stems from their fear of imminent physical injury from an accident or some other immediate physical impact, and denies recovery for emotional distress that arises from a more generalized, less immediate fear. The zone of danger test has proven to be fair, workable, and easy for the lower courts to apply. The Second Circuit's decision in *Buckley* is in fundamental conflict with *Gottshall* because it permits recovery for emotional distress in the absence of any physical injury, any risk of imminent physical injury, or any fear of imminent physical injury.

The Second Circuit's decision in *Buckley* eviscerates the bright line rule established by this Court in *Gottshall*, expands the zone of danger test far beyond its common law roots, permits recovery for a broad range and vast numbers of claims that would not be cognizable under the common law, and, in so doing, returns the FELA to its pre-*Gottshall* state, in which there existed no clear

guidelines for the lower courts in their consideration of FELA negligent infliction of emotional distress claims.[1]

## ARGUMENT

### I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GOTTSHALL* BECAUSE BUCKLEY'S OCCUPATIONAL EXPOSURE CLAIM DOES NOT SATISFY THE *GOTTSHALL* ZONE OF DANGER TEST.

In *Gottshall*, this Court adopted the bright line zone of danger of physical impact test for negligent infliction of emotional distress claims under the FELA. The Court described the test as follows:

> [A] worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact. This rule will further Congress' goal in enacting [FELA] of alleviating the physical dangers of railroading.

*Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2410-11 (1994). Quoting one of the leading law review articles advocating the zone of danger test for negligent infliction

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[1] For a comprehensive analysis of the far-reaching implications of the Second Circuit's decision in *Buckley* on the railroad industry, see the *amicus curiae* brief of the Association of American Railroads filed in support of petitioner.



of emotional distress claims, the Court explained that " 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.' " *Id.* at 2406 (quoting Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 489 (1982)).

In addition, this Court stressed in *Gottshall* that the bright line zone of danger of physical impact test was necessary because, unlike claims for physical injuries that present objective, identifiable harms, without clear principles defining when a claim is cognizable, emotional distress claims present "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Id.* at 2411. As the Court explained: " 'The geographic risk of physical impact caused by the defendant's negligence in most cases is quite limited, which accordingly limits the number of people subjected to that risk. There is no similar finite range of risk for emotional harm.' " *Id.* at 2405 n.4 (quoting Pearson, *supra*, 34 U. FLA. L. REV. at 507).

Significantly, in adopting the zone of danger of physical impact test, the Court made clear that emotional distress claims arising from general working conditions are not cognizable under the FELA. In the Court's view, permitting a cause of action for an employee's emotional reaction to his or her working conditions "would tend to make railroads the insurers of the emotional well-being and mental health of their employees." *Id.* at 2409.

Buckley's claim does not satisfy the clear lines for recovery for negligent infliction of emotional distress under the FELA as established by this Court in *Gottshall*. It is undisputed that Buckley neither experienced a physical injury nor feared imminent physical injury from an impact. Buckley never asserted that he experienced a physical injury. In any event, under this Court's decision in *Urie v. Thompson*, 337 U.S. 163 (1949), occupational diseases, such as silicosis or asbestosis, give rise to compensable injuries under the FELA only if and when adverse physical effects of the disease are manifested. *See also Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.) (exposure to asbestos, without asbestos-related physical injury, does not constitute basis for recovery under FELA), *cert. denied*, 474 U.S. 864 (1985). Buckley did not fear imminent physical injury because his risk of developing disease certainly was not imminent, and, in any case, was minimal.

The Second Circuit held, however, that Buckley experienced a "physical impact" sufficient to satisfy the zone of danger test. The Court identified that "physical impact" as Buckley's exposure to asbestos. *See Buckley v. Metro-North Commuter Ry. Co.*, 79 F.3d 1337, 1343 (2d Cir. 1996). Yet, as the Court acknowledged, and as Buckley's own doctors testified, that "impact" did not result in any physical injury or in any clinical manifestation of asbestos exposure, and gave rise to at most a minimal increased risk that Buckley would develop an asbestos-related illness. *See id.* at 1343-44 ("we think a reasonable jury could find that Buckley suffered a physical impact from large amounts of asbestos fibers despite the lack of clinical proof of asbestos exposure"). Accordingly, the most that



can be said about the "physical impact" that the Second Circuit used to justify Buckley's recovery for emotional distress is that it consisted of an environmental condition that did not manifest itself in physical injury, that did not place Buckley at risk of imminent physical injury, and that did not cause him to fear imminent physical injury.

Exposure to environmental conditions, such as substances in the air, does not satisfy the zone of danger test because it involves neither a "physical impact" nor an "imm diate risk of physical harm." *Gottshall*, 114 S. Ct. at 2406; *see Garcia v. Burlington Northern Ry. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (under *Gottshall*, zone of danger "is a location in which the plaintiff is 'at immediate risk of physical harm' ") (citations omitted); *McMillan v. National Ry. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (plaintiff not in zone of danger when near worker who had punched other workers because "threat of injury" to plaintiff "was not immediate" but was "both speculative and remote"); *see also Outten v. National Ry. Passenger Corp.*, 928 F.2d 74, 78-79 (3d Cir. 1991) (railroad worker outside zone of danger – a mile away from train collision – could not recover for fright and emotional distress); *cf. Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996) ("cases which base recovery upon an 'impact' rather than an injury involve plaintiffs who have witnessed a traumatic physical injury to [another]" and "are not analogous" to asbestos exposure cases where "no physical injury to any party has been established") (citations omitted).

That Buckley's exposure to asbestos does not satisfy the zone of danger test is clear not only from the express terms of this Court's opinion in *Gottshall*, but also from

the Third Circuit's decision on remand, in which the Court rejected Gottshall's argument that his exposure to extreme heat constituted the requisite "physical impact" under the zone of danger test. As the Third Circuit explained (while not reaching the precise issue of asbestos exposure because it was not before the Court), "[i]f the sun's rays and heated air constitute physical impacts, then many work place situations could give rise to an impact within the meaning of the test.[ ] Such an encompassing definition of impact would undercut the Court's desire to draw reasonable limits to employer liability for emotional distress claims." *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530, 535 (3d Cir. 1995), *on remand from* 114 S. Ct. 2396 (1994). At its core, Buckley's claim is nothing more than a variation on Gottshall's.

In short, if the *Buckley* decision is permitted to stand, the clear limits and finite range of the zone of danger test will be lost, and the rule of law established will be equivalent to that expressly rejected by this Court in *Gottshall*. Indeed, the only limit under the Second Circuit's decision in *Buckley* on the recovery of damages for emotional distress arising out of occupational exposure is that the worker's exposure be "massive, lengthy, and tangible." *Buckley*, 79 F.3d at 1345. But this Court's adoption of the zone of danger test in *Gottshall* expressly was predicated on the Court's rejection of such subjective types of standards and of the concomitant subjecting of defendants to "unpredictable and nearly infinite liability." *Gottshall*, 114 S. Ct. at 2408-09; *see also id.* at 2409 (warning that under such fact-specific tests, "[j]udges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional



injury, which are far less susceptible to objective medical proof than are their physical counterparts").

Moreover, if there was any question about whether mere exposure to asbestos – with no physical injury, no risk of imminent physical injury, and no fear of imminent physical injury – is a sufficient "impact" under the zone of danger test to give rise to an FELA emotional distress claim, this Court's precedent establishes that the Second Circuit should have given "great weight," *id.* at 2404, to the common law courts' resolution of this issue. Instead, however, as next discussed, the Second Circuit expressly rejected the virtually uniform common law precedent prohibiting recovery for negligent infliction of emotional distress based on occupational exposure in the absence of physical injury or the likelihood that the plaintiff will develop a disease.

## II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GOTTSHALL* BECAUSE THE SECOND CIRCUIT DISREGARDED THE COMMON LAW PRECEDENT PROHIBITING RECOVERY FOR EMOTIONAL DISTRESS BASED ON OCCUPATIONAL EXPOSURE IN THE ABSENCE OF PHYSICAL INJURY OR THE LIKELIHOOD THAT THE PLAINTIFF WILL DEVELOP A DISEASE.

In determining that the common law zone of danger best reflects the purposes of the FELA, the Court looked "to FELA itself, its purposes and background, and the construction we have given it over the years." *Gottshall*, 114 S. Ct. at 2403. Moreover, the Court emphasized that

"because 'FELA jurisprudence gleans guidance from common-law developments,' [the Court] must consider the common law's treatment of the right of recovery asserted by respondents." *Id.* (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568 (1987)). As the Court explained, "although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis." *Gottshall*, 114 S. Ct. at 2404.

Under the common law, "impact" for purposes of the zone of danger test is a "violent physical contact, a striking together, a collision." *Williams v. Baker*, 572 A.2d 1062, 1064 n.8 (D.C. 1990); *see also Mitchell v. Hadl*, 816 S.W.2d 183, 184 (Ky. 1991) ("physical contact"); *OB-GYN Assocs. v. Littleton*, 386 S.E.2d 146, 148 (Ga. 1989) ("actual bodily contact"). Thus, common law courts applying the zone of danger test generally permit only those plaintiffs involved in or threatened with traumatic impact-producing accidents to recover for emotional distress. *See, e.g., Dobelle v. National Ry. Passenger Corp.*, 628 F. Supp. 1518, 1521, 1525 (S.D.N.Y. 1986) (fifteen-foot section of steel rail that struck and penetrated passenger train); *Keck v. Jackson*, 593 P.2d 668, 668-70 (Ariz. 1979) (automobile accident); *Towns v. Anderson*, 579 P.2d 1163, 1165 (Colo. 1978) (*en banc*) (gas explosion that lifted house off its foundation); *see also Niederman v. Brodsky*, 261 A.2d 84, 90 (Pa. 1970) (plaintiff may recover for emotional distress under zone of danger theory only if he "was in personal danger of physical impact because of the direction of a negligent force against him and [he] actually did fear the physical impact").



Where there is no such obvious impact or threat of impact, common law courts generally do not permit recovery for emotional distress under the zone of danger test. *See, e.g., Kutner v. Eastern Airlines, Inc.*, 514 F. Supp. 553, 559 (E.D. Pa. 1981) (plaintiffs forced to drive home in dangerous weather conditions because of alleged negligence of airline did not state claim for negligent infliction of emotional distress under zone of danger test because there was no "allegation that [the airline] created any negligent force that threatened [them] with a danger of physical impact"); *Lewis v. Westinghouse Elec. Corp.*, 487 N.E.2d 1071, 1072 (Ill. App. Ct. 1985) (although plaintiff in stalled elevator feared danger of suffocation and serious physical harm, she could not recover under zone of danger of test because elevator was merely stalled and she was not at "high risk of physical impact").[2]

In accordance with these principles, the common law cases make clear that occupational exposure does not

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[2] Courts have reached similar conclusions under the common law bystander test, which permits a plaintiff to recover for emotional distress caused by witnessing an injury to a close relative, even if the plaintiff was not within the zone of danger. *See Plummer v. Abbott Labs.*, 568 F. Supp. 920, 924 (D.R.I. 1983) (rejecting plaintiff's argument that bystander rule allowed recovery for emotional distress of DES mothers caused by apprehension that children would develop future medical problems because "there was no episodic single incident to be witnessed; there was merely the insidious development – or, as to many of the targeted plaintiffs, only the threatened development – of a disease process"); *Jansen v. Children's Hosp. Medical Ctr.*, 31 Cal. App.3d 22, 24 (1973) (witnessing gradual decline and death of daughter due to alleged malpractice did not meet bystander test because there was no "sudden and brief event").

satisfy the zone of danger test because there is no traumatic accident, no immediate physical injury, no fear of imminent physical injury, and no imminent risk of disease. Indeed, every common law zone of danger case of which Conrail is aware has rejected recovery for occupational exposure, in the absence of physical injury or imminent risk of disease. *See, e.g., Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 592 (5th Cir. 1986) (Louisiana law); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985) (Pennsylvania law); *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 25 (Del. Super. Ct. 1983), *aff'd*, 480 A.2d 647 (Del. 1984) (Delaware law).

Indeed, whether applying the zone of danger or any other test, federal and state courts applying state common law are virtually unanimous in holding that occupational exposure such as that at issue here, without present physical injury or the likelihood of developing a disease in the future, cannot support a claim for negligent infliction of emotional distress. *See, e.g., Ball v. Joy Techs., Inc.*, 958 F.2d 36, 38 (4th Cir.) (Virginia and West Virginia law) (no recovery for negligent infliction of emotional distress because "mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle plaintiffs to recover for their emotional distress"), *cert. denied*, 502 U.S. 1033 (1992); *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987) (New Jersey and Pennsylvania law) (no recovery for negligent infliction of emotional distress absent physical injury caused by asbestos exposure or physical manifestation of the feared disease); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (no cause of action for emotional distress based on asbestos exposure in the



absence of actual compensable harm); *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112, 114 (M.D. La. 1988) (requiring present PCB-related injury as predicate to recovery for mental anguish arising from exposure to PCBs), *aff'd*, 872 F.2d 422 (9th Cir. 1989); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987) (no recovery for emotional distress and fear of cancer for plaintiffs with no asbestos-related disease, because "[j]ustice would not be done either to the plaintiffs or the defendants by allowing a suit prior to manifestation of any physical injuries or disease"), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984) (in asbestos exposure case, present physical injury required in order to state claim for mental anguish); *Doner v. Ed Adams Contracting, Inc.*, 617 N.Y.S.2d 565, 566 (App. Div. 1994) (denying recovery for emotional distress to asbestos-exposed plaintiff who did not show likelihood of contracting disease as result of exposure); *see also Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827, 848 (3d Cir. 1995) (Pennsylvania law) (no recovery for emotional distress for uninjured plaintiffs exposed to toxic wastes in soccer field that was formerly a landfill), *cert. denied*, 116 S. Ct. 772 (1996); *cf. Locke v. Johns-Manville Corp.*, 275 S.E.2d 900, 904-05 (Va. 1981) (in determining whether suit was timely filed, stating that action for cancer arising from asbestos exposure does not accrue until plaintiff suffers actual physical harm; "legally and medically there was no injury upon inhalation of defendants' asbestos fibers").

Rather than following the teachings of the common law as required by *Gottshall*, the Second Circuit found the virtually uniform common law precedent "inapposite."

*See Buckley*, 79 F.3d at 1345. Instead, the Court chose to rely on three decisions. One of those decisions, *Wetherill v. University of Chicago*, 565 F. Supp. 1553 (N.D. Ill. 1983), can only be described as anomalous and is, in any event, of dubious authority, having been disavowed by later courts in recognition of the Illinois courts' "refus[al] to allow recovery for mental or emotional distress in the absence of a physical injury or illness." *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367, 1371-72 & n.4 (N.D. Ill. 1988). The other two decisions relied upon by the Second Circuit support Metro-North's position, not Buckley's, because they involved an actual physical injury. *See Hagerty v. L & L Marine Servs.*, 788 F.2d 315, 316-17 (5th Cir. 1986) (plaintiff sustained impact after being doused with chemicals and suffered dizziness, leg cramps, and stinging sensation in his extremities); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 478, 480 (C.P. Cayahoga Cty. 1987) (plaintiff had physical injury – asbestosis).

In *Gottshall*, this Court emphasized that the Third Circuit's rejection of the common law was fundamental error. *See Gottshall*, 114 S. Ct. at 2408 ("[b]y treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on 'meritorious' FELA claims, the Third Circuit put the cart before the horse: the common law must inform the availability of a right to recover under FELA for negligently inflicted emotional distress, so the 'merit' of a FELA claim of this type cannot be ascertained without reference to the common law"). As the Court made clear, in terms that starkly reveal the Second Circuit's error in *Buckley*:



> Our FELA cases require that we look to the common law when considering the right to recover asserted by respondents, and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability.

*Id.* at 2411.

In sum, the Second Circuit's decision is contrary to *Gottshall* both because Buckley's claim does not satisfy *Gottshall's* zone of danger test and because, like the Third Circuit's decisions in *Gottshall* and *Carlisle* that this Court reversed, the Second Circuit's decision allows recovery under the FELA for injuries that are not compensable under the common law.

## CONCLUSION

For the foregoing reasons, *amicus curiae* Consolidated Rail Corporation respectfully requests that this Court grant the petition for a writ of certiorari.

RALPH G. WELLINGTON*
NANCY WINKELMAN
*Attorneys for Amicus Curiae Consolidated Rail Corporation*

**Counsel of Record*

SCHNADER HARRISON SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2000

BRUCE B. WILSON
LUCY S.L. AMERMAN
THOMAS J. WAMSER
ELLEN M. GOERING
Consolidated Rail Corporation
2001 Market Street
Philadelphia, PA 19103
*Of Counsel.*

Dated: September 27, 1996.